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STATE OF WASHINGTON

OFFICE OF MINORITY AND WOMEN'S BUSINESS ENTERPRISES

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**Personal Service/Certified Mail
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February 27, 2012

Mr. Fredell L. Anderson
Leajak Concrete Construction Inc.
PO Box 250
Mountlake Terrace, Washington 98043

Mr. Mick Matsuzawa
Operations Manager
OMWBE
PO Box 41160
Olympia, Washington 98504-1160

Subject: ***Request for Show Cause Review received January 10, 2012
OMWBE File No. 10714***

Dear Mr. Anderson and Mr. Matsuzawa:

This is your notification of the Certification Committee's decision concerning Leajak Concrete Construction Inc.'s current eligibility for state and federal certifications. The Certification Committee has carefully reviewed the new documentation and information submitted and all other documents contained in your application file.

I. Procedural History

Leajak Concrete Construction Inc. (the "Firm") originally was certified on November 5, 1992 as a Minority Business Enterprise (MBE) and Disadvantaged Business Enterprise (DBE). (See File Document SCR - 1.)

A *Third-Party Complaint* filed a complaint against the Firm on September 19, 2011 (see File Document SCR - 2). The complaint states in part that the Firm operates as a conduit on projects to pump concrete. The Complainant asked the Washington State Office of Minority and Women's Business Enterprises (the Office) to only consider whether the Firm should remain certified for concrete pumping.



The Office assigned Ms. Melissa Hopkins, Management Analyst 4 to conduct an investigation based on the *Third-Party Complaint*. The Office sent an *Intent to Remove Letter* to remove **MBE** and **DBE** certifications from the Firm on December 29, 2011 (see File Document SCR – 3). The Office's *Intent to Remove Letter* states in part that the Firm failed to supply additional information in a timely manner.

On January 10, 2012, the Firm requested a *Show Cause Hearing*. (See File Document SCR-4.) On February 11, 2012, the Firm requested a file review in lieu of a face-to-face hearing (*Show Cause Review*). (See File Document SCR-5.)

II. Introduction

The Certification Committee must review all the documents submitted and the entire application file to make a final determination as to whether the Firm requested a *Show Cause Review*, whether that request is timely, and whether the Firm is eligible for **MBE** certification. The Firm has the burden of proof to prove it is eligible for certification. (See WAC 326-20-160.) The Firm is not certifiable if it has not met any one requirement of the OMWBE program. The Office reserves the right to add additional grounds for denial. (See WAC 326-20-170.) If the Firm makes a change in ownership, control, or organization after decertification it is not entitled to appeal the decertification based on that change. (See WAC 326-20-220(2).)

The Certification Committee must review all the documents, statements and testimony submitted with the request for *Show Cause Review* and the entire application file to make a final decision as to whether the Firm remains eligible to be **DBE** certified. (See 49 CFR §26.87(a)(2).)

The Office has the burden of proof by a preponderance of evidence to prove the Firm is no longer eligible for **DBE** certification. (See 49 CFR § 26.87(d)(1).) A business may be removed from **DBE** certification when any one of the following occurs:

- 1) Changes in the Firm's circumstances since the certification of the Firm by the Office that render the Firm unable to meet the **DBE** eligibility standards;
- 2) Information or evidence not available to the Office at the time the firm was certified;
- 3) Information that was concealed or misrepresented by the Firm in previous certification actions by the Office;

- 4) A change in the certification standards or requirements of US Department of Transportation since Office certified the Firm; or
- 5) A documented finding that the Office's determination to certify the Firm was factually erroneous.

(See 49 CFR § 26.87(f)(1) – (5).) Grounds for a decision to remove eligibility must not be based on a reinterpretation or changed opinion of information available to the Office at the time of its certification of a firm. (See 49 CFR § 26.87(f).)

III. Findings of Fact

A. Control - Independence

1. Around October 30, 2008, the Firm requested additional North American Industry Classification System (NAICS) codes, including Concrete Pumping (see File Document SCR-6). To receive the NAICS code for specific work performed, the Office must include:
 - a. the sub-industry scope of work in the Business Description section of the Firm's certification or recertification letter;
 - b. the NAICS code six-digit number corresponding to the sub-industry scope of work; **and**
 - c. the Corresponding Index Entry

The Office did not add concrete pumping.

2. The Firm requested the additional NAICS code for Concrete Pumping on its Annual Update Application form on July 23, 2009 (see File Document SCR-7).
3. The Office performed an on-site on March 30, 2010 (see File Document SCR-8).
4. On April 12, 2010, the Office reviewed the Firm's Annual Update Application and made changes to the Firm's business description. The Office added Concrete Pumping to the Firm's business description, but it did not assign the appropriate NAICS code with Corresponding Index Entry - 238110 – Concrete Pumping (i.e., Placement). (See File Document SCR-9).

5. On March 8, 2011, the Office recertified the Firm with the current business description and NAICS codes (see File Document SCR-10). Although the Firm had Concrete Pumping in its business description, the letter did not list the NAICS code Corresponding Index Entry for Concrete Pumping - 238110 – Concrete Pumping (i.e., Placement). The Firm's current business description since March 8, 2011 is:

FOUNDATION & STRUCTURE CONCRETE CONSTRUCTION,
CONCRETE PAVING, CONCRETE PUMPING, PRECAST PANEL
PLACEMENT, ABUTMENT CONSTRUCTION, FINISH
CARPENTRY CONTRACTOR, CARPENTRY FRAMING

The Firm's current NAICS codes are:

238110- POURED CONCRETE FOUNDATION AND STRUCTURE
CONTRACTORS
238350- FINISH CARPENTRY CONTRACTORS
238130- CARPENTRY, FRAMING
237310- CONCRETE PAVING (I.E.; HIGHWAY, ROAD, STREET,
PUBLIC SIDEWALK)
237310- ABUTMENT CONSTRUCTION
238120- PRECAST CONCRETE PANEL, SLAB, OR FORM
INSTALLATION

6. The WSDOT Work Category Description assigned to the Firm when bidding on WSDOT projects (see File Document SCR-11) includes:

CONCRETE - CAST IN PLACE; CONCRETE –
FOUNDATIONS/SLABS; CONCRETE – SHOT CRETE FACING;
CONCRETE – WATERPROOFING; RETAINING WALLS –
CONCRETE, CARPENTRY – FINISH; JOINER SYSTEMS;
CAPRENTRY – ROUGH/FRAMING/FORMS; CONCRETE –
PAVING; CONCRETE – PRECAST; NOISE WALLS – CONCRETE

7. Washington State Department of Transportation (WSDOT) performed a Commercially Useful Review (CUF) of the Firm on January 11, 2011. WSDOT found the Firm did not perform a commercial useful function concerning management, equipment, employees, and performance on the Spokane Way Viaduct project for concrete pumping. WSDOT notified the Firm of its CUF Report on April 5, 2011. WSDOT notified the Office on

April 7, 2011 of its concerns of Mr. Anderson's technical expertise and the Firm's independence for DBE certification. (See File Document SCR-12.)

B. Cooperation

1. The Firm has provided all the required documents for **MBE** and **DBE** certifications. (See File Documents SCR-13.)

IV. Conclusions of Law

The Firm did request adding the NAICS code for Concrete Pumping in 2008 and 2009. Although the Office intended to assign the requested NAICS code and added Concrete Pumping to the business description, the Office never assigned the NAICS code with Corresponding Index Entry as required to perform the scope of work as a DBE on federally funded projects. Although initially WSDOT accepted the Firm as a DBE on the Spokane Viaduct for purposes of goal counting to perform Concrete Pumping, WSDOT determined the Firm did not perform a commercially useful function on that specific project. A sole incident of not performing a commercially useful function cannot be used to remove the Firm's certification, but can be considered with the review of the entire application file (viewed as a whole) to remove a specific NAICS code with Corresponding Index Entry. (See §26.71(a), (b), (g), (m), (n), and (q) and §26.73(a) and (b).) Based on the entire record and documents in the Firm's application, the Committee has determined that the Firm is not eligible for the NAICS code for Concrete Pumping:

238110 – CONCRETE PUMPING (I.E., PLACEMENT)

in part because it was not listed in the Firm's letter, WSDOT's CUF Report, and the Firm's changed circumstances since the Office considered assigning the NAICS code to the Firm.

When (the Office or) the Committee determines that the Firm is no longer eligible to be certified for a specific NAICS code, the Firm remains **MBE** certified provided the Firm remains eligible to perform work under its primary NAICS code with Corresponding Index Entry. (See WAC 326-20-092, 326-20-094, 326-20-095, and 326-20-096.) Based on the entire record and documents in the Firm's application, the Committee has determined that the Firm is eligible to perform work for its primary NAICS code with Corresponding Index Entry:

238110- POURED CONCRETE FOUNDATION AND STRUCTURE
CONTRACTORS

When (the Office or) the Committee determines that the Firm is no longer eligible to be certified for a specific NAICS code, the Firm remains **DBE** certified provided the Firm remains eligible to perform work under different NAICS codes with Corresponding Index Entries. (See §26.71(a), (b), (g), (m), (n), and (q).) Based on the entire record and documents in the Firm's application, the Committee has determined that the Firm is eligible to perform work for the remaining NAICS codes with Corresponding Index Entries listed on its recertification letter.

The Office notified the Firm that it intended to remove the Firm's **MBE** and **DBE** certifications for failure to cooperate. The Office did not raise any other issues in its letter to the Firm. The Committee has determined that the Firm fully cooperated with the Office when it submitted all the documents and information requested that were necessary to make a certification determination, even though the Firm did so beyond the allotted time the Office provided. (See WAC 326-20-140 and §26.73(c) and §26.109(c).)

V. Decision

A. MBE

Based upon all of the documentation before the Certification Committee, the Firm has established by the preponderance of the evidence:

1. the Firm met its duty to cooperate with the Office as defined and referenced in WAC 326-20-140

Accordingly, the original decision to decertify the Firm is **reversed**. **The Committee directs the Office to remove CONCRETE PUMPING from the Firm's Business Description.** This decision is administratively final.

B. DBE

Based upon all of the documentation before the Certification Committee, the Office has **not** established by the preponderance of the evidence:

1. the Firm failed to meet its duty to cooperate with the Office as defined and referenced in 49 CFR §26.73(c) and §26.109(c).

Accordingly, the original decision to remove federal certification from the Firm is **reversed**. **The Committee directs the Office to remove CONCRETE PUMPING from the Firm's Business Description.** This decision is administratively final.

If you have any questions, please call me at (360) 561-5590.

Sincerely,

CERTIFICATION COMMITTEE

A handwritten signature in black ink, reading "Vicky Schiantarelli". The signature is fluid and cursive, with a large initial "V" and a trailing flourish.

By:
Vicky Schiantarelli,
Certification Committee Chair

VS:

cc: Brenda Nnambi, OEO Director, WSDOT
Gina King, Certification Committee Member
Katherine McKinney, Lead Management Analyst 4
Melissa Hopkins, Management Analyst 4

**Show Cause Review Exhibits for Leajak Concrete Construction Inc.
January 10, 2012 Show Cause Review**

List One: File Documents from the Firm's Application File

Number	Exhibit Title	Date of Exhibit (if Applicable)
SCR - 1	State and Federal Certification Letter	N/A
SCR - 2	Third Party Complaint	N/A
SCR - 3	Intent to Remove Letter	N/A
SCR - 4	Appeal Letter	N/A
SCR - 5	Request for File Review Email	N/A
SCR - 6	Add NAICS Code Request Fax	N/A
SCR - 7	Annual Update Application Form	N/A
SCR - 8	OMWBE On-Site Report	N/A
SCR - 9	Annual Update Application and NAICS codes Letter	N/A
SCR - 10	Recertification Letter	N/A
SCR - 11	WSDOT Work Category Description	N/A
SCR - 12	WSDOT Commercially Useful Function (CUF) Report	N/A
SCR - 13	Additional Information Request Documents and Information	N/A